IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 761 OF 1999

IN

SUIT NO. 3423 OF 1991

Pravinkumar Khimji)
residing at 2nd Floor, Bhoj Mahal,)
Tejookaya Park, Dr.B. Ambedkar Road,)
Matunga, Bombay-400 019.) .. Appellant

V/s

1. Mrs. Hansa Kantilal alias Kalpana)
Kantilal, of Bombay Indian Inhabitant)
residing at Block F. Room No.25 & 26)
Bhoj Mahal, Dr. B. Ambedkar Road,)
Matunga, Bombay-400 019.)

2. Mrs. Kishori Pramodkumar)
of Bombay Indian Inhabitant)
residing at Block F. Room No.25 & 26)
Bhoj Mahal, Dr. B. Ambedkar Road,)
Matunga, Bombay-400 019.)

3. Messrs Ajanta Warehousing Company)
a registered partnership of which)
Plaintiffs Nos.1 & 2 are the only)
partners having its Registered)
Office at 545, Tejookaya Park,)
Dr.B.A. Road, Matunga,)
Bombay-400 019.)

4. Kantilal Khimji)
of Bombay Indian Inhabitant)
residing at 2nd Floor,)
Bhoj Mahal, Dr. B. Ambedkar Road,)
Matunga, Bombay-400 019.)

5. Pramod Khimji)
of Bombay Indian Inhabitant)
residing at 2nd Floor,)
Bhoj Mahal, Dr. B. Ambedkar Road,)
Matunga, Bombay-400 019.)

6. Mrs. Daulat Kumari Ramniklal Meckoni)
of Bombay Indian Inhabitant,)
residing at 3rd Floor, Meckoni House)
Bhandarkar Road, Matunga,)
Bombay-400 019.)

7. Mrs. Urmila Shantilal Meckoni)
of Bombay Indian Inhabitant,)
residing at 4th Floor, Meckoni House)
Bhandarkar Road, Matunga,)
Bombay-400 019.)

8. Mrs. Chandan Pravin Shah)
of U.S.A., Indian Inhabitant,)
through Defendant No.2 as her duly)
Constituted Attorney)
residing at 2nd Floor,)
Bhoj Mahal, Dr. B. Ambedkar Road,)
Matunga, Bombay-400 019.)

9(a) Pushpa Dhiraj Shah (wife))
(b) Mayur Dhiraj Shah (son))
(c) Amar Dhiraj Shah (son))
(d) Paras Dhiraj Shah (son))

All of Bombay Indian Inhabitant,)
residing at 2nd Floor,)
Bhoj Terrace, Tejookaya Park,)
Dr. B. Ambedkar Road,)
Matunga, Bombay-400 019.)

10. The Court Receiver, High Court,)
Bombay as Receiver appointed in)
Testamentary & Intestate Petition)
No.651 of 1989 and having his)
office at Bank of India Building,)
M.G. Road, Bombay-400 023.) .. Respondents

Ms.R.C. Nichani for the Appellant.

Mr.Shailesh Shah i/b L.C. Tolat & Co. for Respondents No.1 to 3.

CORAM : R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATE : 20TH APRIL 2007

ORAL JUDGMENT: (Per R.M.S. Khandeparkar, J.)

1. Heard. This appeal arises from order dated 17th March 1997 passed in Suit No.3423 of 1991. By the said impugned order, the suit is purportedly disposed of in exercise of powers under Order VIII Rule 10 of Code of Civil Procedure. The impugned order reads thus:

> " Mr.Birendra Saraf i/b M/s L.C. Tolat & Co., for the Plaintiffs. Defendants absent though served, Advocate Mr.S.P. Jog, for Defendants Nos.2 to 7(d) absent. Affidavit of service dated 4th February, 1992 along with original Writ of Summons is already in the proceedings. Today, Mr.Saraf, appearing for the Plaintiffs tenders original documents as per list, which are taken on record and are marked Exhibit "A" collectively.
>
> . Heard Mr.Saraf for the Plaintiffs. Perused the proceedings and original documents, and accordingly, following order is passed:
>
> . Decree in terms of prayer clauses (a), (b), (d), (e), (g) and (i).
>
> . As far as prayer (b) is concerned, Plaintiffs to deposit with the office of the Prothonotary

and Senior Master, High Court, Bombay an amount of Rs.48,338/- within a week's time.

. Mr.Saraf for the Plaintiffs prays that he may be permitted to withdraw the original documents. Permission granted, on the Plaintiffs' Advocate giving an undertaking that the original documents will be produced as and when required and on his furnishing the xerox copies of the original documents, duly certified as true copies.

. Prothonotary to act on the copy of the minutes of this order, certified and authenticated by the Court Receiver."

2. Plain reading of the above order would disclose that the suit was sought to be disposed of in exercise of powers under Order VIII Rule 10 of the Code of Civil Procedure. However, the learned Single Judge has not passed any "judgment" within the meaning of the said expression under Order VIII Rule 10 read with Section 2(9) of the Civil Procedure Code. The law on this point is well settled in view of the decisions in the matter of:

(i) Balraj Taneja & Anr. v. Sunil Madan & Anr. reported in (1999) 8 SCC 396,

(ii) All India Central Bank Employees Congress & Ors. v. Central Bank of India - delivered on 17th January 2007 in Appeal No.901 of 2006,

(iii) Municipal Corporation of Greater Mumbai & Ors. v. Azharali Anwarali Sambhalwala - delivered on 30th March 2007 in Appeal No.152 of 2007

Therefore, in view of the reasons recorded in two of the above judgments delivered by this Court, the impugned order cannot be sustained. Whenthe Court proceeds to exercise powers under Order VIII Rule 10 of the Code of Civil Procedure, it is necessary for the Court to deliver a judgment and the judgment would imply reasons to be recorded by the Court for granting the reliefs asked for. Undoubtedly, such exercise can be done solely on the basis of the facts stated in the plaint. However, consideration of the facts stated in the plaint would include application of mind to the aspect as to whether the Plaintiff is entitled for the relief asked for on the basis of the facts disclosed in the plaint. The Court is also required to consider the provisions of law applicable to the facts disclosed in the plaint.

Having no such exercise done by the learned Single Judge while disposing of Suit No.3423 of 1991 even though the matter was sought to be disposed of in exercise of Order VIII Rule 10 of the Code of Civil Procedure, the impugned order cannot be sustained and is liable to be set aside and the matter is required to be remanded to the learned Single Judge to deal with the suit in accordance with the law.

3. It is made clear that we have not expressed any opinion on any of the issues on merits sought to be raised in the matter and all contentions of the parties are kept open.

4. In the result, the appeal succeeds on the above limited ground and the impugned order is set aside and the matter is remanded to the learned Single Judge to deal with the suit in accordance with the law. No order as to costs.

(R.M.S. KHANDEPARKAR, J.)

(D.G. KARNIK, J.)